IN THE UNITED STATES PATENT & TRADEMARK OFFICE

In re the Application of:	)	**MAIL STOP AF**
	)	
Syed, Majid	)	
	)	Group Art Unit: 2155
Serial No.: 10/044,195	)	
	)	Examiner: Nguyen, Thuong
Filed: October 26, 2001	)	
	)	
For: Arbitrator System and Method for National and Local Content Distribution	)	Conf. No.: 9765

Mail Stop AF
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

PRE-APPEAL-BRIEF REQUEST FOR REVIEW

Sir:

Claims 1-39 stand finally rejected. In particular, claims 1, 5, 8-9, 13-18, and 37-39 stand rejected under 35 U.S.C. § 102(e) as allegedly being anticipated by U.S. Patent No. 6,721,337 ("Kroeger"). Claims 7, 10, 19, 23, 25-28 and 31-36 stand rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Kroeger in view of U.S. Application Pub. No. 2002/0044567 to Voit et al. (hereinafter "Voit"). Claim 2 stands rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Kroeger in view of U.S. Pat. No. 5,935,218 to Beyda et al. (hereinafter "Beyda"). Claims 3-4 and 21-2 stand rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Kroeger in view of Beyda and further in view of Voit. Claim 20 stands rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Kroeger in view of Voit and further in view of Beyda. Claims 6 and 11 stand rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Kroeger in view of U.S. Pat. No. 5,615,249 to Solondz et al. (hereinafter "Solondz"). Claims 24 and 29 stand rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Kroeger in view of Voit and further in view of Solondz. Claim 12 stands rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Kroeger in view of U.S. Pat. No. 6,782,510 to Gross et al. (hereinafter "Gross"). Claim 30 stands rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Kroeger in view of Voit and further in view of Gross.

The rejections of claims 1-39 are now appealed. Review of the final rejection prior to filing an appeal brief is respectfully requested for the reasons set forth below. It is respectfully submitted that the rejections fail to establish *prima facie* cases of anticipation and obviousness and are based upon clear errors of fact and law.

I. Independent claims 1, 37, 38 and 39 are not anticipated at least because Kroeger does not disclose determining relative levels of data content based upon priority indicators, service categories and service classes of data content as required by these claims.

Independent claim 1 recites an intelligent digital broadcast scheduling system comprising, *inter alia,* an arbitrator that determines relative levels of data content based upon priority indicators, service categories, and service classes of data content. Claims 37, 38 and 39 recite a method, a system, and a computer readable medium, respectively, that involve, *inter alia*, determining relative levels of data content based upon priority indicators, service categories, and service classes of said data content.

In contrast, Kroeger does not disclose determining relative levels of data content based upon priority indicators, and service categories, and service classes of data content. The examiner cites to col. 4, line 45 – col. 5, line 28 and col. 11, lines 30-60 of Kroeger for allegedly disclosing the alleged priority indicators, service categories, and service classes. Applicants observe that Kroeger discloses priority classes for message prioritization. However, claims 1, 37, 38 and 39 require that the claimed determination of relative levels of data content is based upon priority indicators, and service categories and service classes, i.e., the determination is based upon all three of the priority indicators, service categories and service classes (the determination could be based on more than this, but the claim requires it be based upon at least these three things). Kroeger does not disclose determining relative levels of data content based upon priority indicators, service categories and service classes (i.e., all three of priority indicators, service categories and service classes). Accordingly, Kroeger cannot anticipate independent claims 1, 37, 38 and 39 for at least these reasons. Withdrawal of the rejection and allowance of claims 1, 37, 38, and 39 are requested for at least this reason. Claims 5, 8, 9, 13-18 are allowable at least by virtue of dependency.

In the prior Amendment, Applicants stated that Kroeger did not disclose the combination of priority indicators, service categories and service classes. The examiner took exception to those comments and states at page 25 of the Office Action, "There is nothing in the claim stated that the levels of data content based upon a combination of 'priority indicators, service categories, and service classes.'" By those comments, Applicants did not

mean that the priority indicators, service categories and service classes were combined in the sense of three quantities being combined into one quantity. Applicants simply meant that Kroeger did not disclose determining relative levels of data content based upon priority indicators, and ervice categories and service classes (i.e., all three of priority indicators, service categories and service classes), as discussed above.

Applicants further point out that determining relative levels of data content based upon priority indicators, service categories, and service classes of data content according to the present application provides a more flexible approach for scheduling content for broadcast transmission than is disclosed or suggested by the cited art. For example, as reflected in FIG. 3 of the present application, service classes (e.g., basic, preferred, premium, etc.) and priority (e.g., normal, urgent, emergency) provide substantial flexibility in scheduling content, and the addition of service category (e.g., unknown/unspecified, administrative, maintenance, talent announcement, advertisement, news, sports, weather, traffic, emergency, alert, stocks, entertainment, restaurants, lodging, medical, health, hospitals, multimedia, audio, logo, text, etc.) significantly increases the information from which relative levels of data content can be determined and upon which scheduling decisions can be made. Such flexibility is not disclosed or suggested by the cited art.

II. The Office Action improperly confuses obviousness and anticipation in the § 102(e) rejection based upon Kroeger

In the "Response to Arguments" the Examiner states, with regard to the § 102(e) *anticipation* rejection based upon Kroeger, "It's *obvious* to one of ordinary skill in the art at the time of the invention to relate the priority associate with the quality of services for the user. User whom pay higher price would get better services and higher priority." (Office Action at page 25, emphasis added.) While the Examiner's statement is not entirely understood, it is apparent that the Examiner's statement confuses obviousness and anticipation in the § 102(e) rejection based upon Kroeger, and doing so is plainly improper. The Examiner cannot rely on an obviousness rationale in a rejection under § 102(e). Withdrawal of the rejection under § 102(e) is requested for at least this additional reason.

III. Independent claim 19 and dependent claims 12-4, 6, 7, 10-12, and 20-36 are not obvious because the Office's reliance upon the secondary references does not make up for features not disclosed in Kroeger

The Office Action also includes a rejection of claims 2-4, 6, 7, 10-12, and 19-36 under 35 U.S.C. § 103(a) as allegedly being unpatentable over Kroeger in view of various secondary references -- U.S. Pub. No. 2002/0044567 ("Voit"), U.S. Pat. No. 5,935,218 ("Beyda"), U.S. Pat. No. 5,615,249 ("Solondz"), and U.S. Pat. No. 6,782,510 ("Gross"). This rejection is respectfully traversed.

Claim 19 recites subject matter similar to that recited in claim 1 along with additional subject matter. The Office alleges that Kroeger discloses all the limitation of claim 19 except for one or more gateways, and alleges that Voit discloses this subject matter. (Office Action at p. 10). However, claim 19 recites that the claimed determination of relative levels of data content is based upon the combination of priority indicators, service categories and service classes, a combination which is not disclosed in Kroeger. Moreover, since Kroeger does not disclose a combination of priority indicators, service categories and service classes, Kroeger cannot disclose determining relative levels of data content based upon priority indicators, service categories and service classes. The Office's reliance upon Voit does not make up for the absence of this subject matter in Kroeger.

Accordingly, withdrawal of the rejection and allowance of claim 19 are respectfully requested for at least these reasons. Claims 2-4, 6, 7, 10-12, and 20-36 depend variously from claims 1 or 19, and are therefore allowable at least by virtue of dependency.

IV. Kroeger is disqualified as prior art under 35 U.S.C. § 103(c) in the obviousness rejections.

This argument was made in the previous amendment, but the Examiner appears to have entirely missed it. It is stated again here. Kroeger is disqualified as prior art under 35 U.S.C. § 103(c) in the obviousness rejections against the above-identified claims. Under 35 U.S.C. § 103(c), for an application to a claimed invention filed on or after November 29, 1999, subject matter that qualifies as prior art under only 35 U.S.C. §§ 102(e), 102(f) or 102(g) is disqualified as prior art in a § 103(a) rejection where that subject matter and the claimed invention were, at the time the claimed invention was made, owned by the same person or subject to an obligation of assignment to the same person. In this case, the application of the present invention was filed on October 26, 2001, and Kroeger qualifies as prior art under only § 102(e). Further, it is stated that the claimed invention of the present

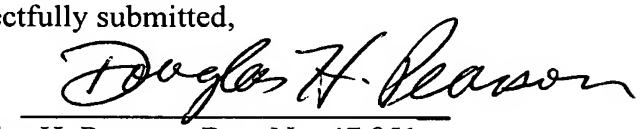
application and the subject matter of Kroeger were, at the time the claimed invention was made, owned by the same person or subject to an obligation of assignment to the same person, namely, iBiquity Digital Corporation, as evidenced at least by recorded instruments in each. An assignment to iBiquity Digital Corporation for the present application was executed on October 4, 2001, and recorded at the U.S. Patent and Trademark Office (USPTO) on October 26, 2001, at reel 012494, frame 0058. A change of name to iBiquity Digital Corporation for the Kroeger subject matter was executed on August 21, 2000, and recorded at the USPTO on March 28, 2001, at reel 011658, frame 0769. Accordingly, withdrawal of the obviousness rejections and allowance of claims 2-4, 6, 7, 10-12, and 19-36 are respectfully requested for at least this additional reason.

V. Conclusion

As explained above, the rejections in the Final Office Action do not establish *prima facie* cases of anticipation and obviousness and are based upon clear errors of fact and law. For at least the reasons given above, it is respectfully requested that the rejections be withdrawn and that a Notice of Allowance be issued.

Respectfully submitted,

Date: October 23, 2007

By: 

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